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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR - 5 2004
Federal Communications Commission
Bureau Office

In the Matter of)
)
Amendment of Section 73.202(b)) MB Docket No. 03-12
Table of Allotments) RM-10627
FM Broadcast Stations)
(Charles Town, West Virginia and)
Stephens City, Virginia))

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TO: Assistant Chief, Audio Division
Media Bureau

Federal Communications Commission
Office of the Secretary

REPLY TO OPPOSITION

Mid Atlantic Network, Inc. ("Mid Atlantic") hereby replies to the Opposition filed by Cleveland Radio Licenses, L.L.C., a wholly owned subsidiary of Clear Channel Broadcasting License, Inc. ("Clear Channel") in response to the "Motion for Leave to Supplement and "Supplement to Petition for Reconsideration" filed by Mid Atlantic. Clear Channel's Opposition is procedurally without merit and substantively touches upon the very reason that the Commission should reconsider its action in this proceeding.

Procedurally, Clear Channel argues that the Commission is "statutorily barred" from considering Mid Atlantic's Supplement to its timely filed Petition for Reconsideration and that FCC Rule § 1.429(d) requires any supplement to be filed within the same 30 day time period as a petition for reconsideration. Both arguments are without merit. First, Mid Atlantic's Petition for Reconsideration was filed within the requisite 30 day time period in compliance with 47 U.S.C. § 405 and FCC Rule § 1.429(d). That rule goes on to state that any supplement to a petition for reconsideration filed *after* expiration of the 30 day period will be considered "upon leave granted . . . stating the grounds for acceptance of the supplement."

Thus, it is entirely untrue that supplements cannot be filed beyond the 30 day time period for filing the original petition for reconsideration.

Clear Channel then alleges that “Mid Atlantic does not even attempt to demonstrate why the Commission should accept the Supplement.” Again, this is entirely false. The pleading is entitled “Motion for Leave to Supplement” and explains in the second paragraph that it is “being filed pursuant to a speech made by FCC Commissioner Kathleen Abernathy one week ago on March 3, 2004” Thus, the Motion explains that it is based on facts that could not have been known prior to March 3, 2004. Although Mid Atlantic did not accompany its Supplement with a “separate” motion for its acceptance, the Motion is clearly labeled and, with the Supplement, is only three pages long. Separate pleadings would have required Mid Atlantic to file duplicative documents with different titles. The Commission has previously waived the requirement that the motion for acceptance be provided in a separate pleading and we submit that this case merits such a waiver, if necessary. *See, e.g., In the Matter of MIS & WATS Market Structure*, 101 F.C.C. 2d 1222, 1235 n.51 (1985).

Clear Channel’s final procedural attack is a claim that Mid Atlantic has violated FCC rules by “filing a Petition for Reconsideration without participating in the proceeding below or demonstrating why it could not have participated below.” Like Clear Channel’s other procedural attacks, this one is similarly without merit. It is well settled that “any interested person may petition for reconsideration of a final action” in a notice and comment rule making proceeding, such as this one, *without* having participated in earlier stages of the

proceeding (or showing why they did not participate). *FM Channel Assignments*, 49 R.R. 2d 703 n.5 (1981). There is no earlier participation requirement in FCC Rule § 1.429.¹

Of more significance than Clear Channel's misplaced procedural arguments, however, is the substantive basis for Mid Atlantic's Supplement. As indicated in Commissioner Abernathy's speech, the Commission intends to review radio consolidation under a "hard look" analysis, similar to the "flagged" transactions reviewed prior to June 2003. Clear Channel calls this argument "frivolous" on the grounds that this analysis "can be applied, if at all, to an assignment or transfer of a broadcast license," and not to "a proceeding to amend the FM Table of Allotments." This gets to the heart of Mid Atlantic's very point here. Clear Channel is attempting to do in two steps (assignment plus market change) what it could not have done in one step without Commission scrutiny.

Specifically, Clear Channel bought a station that was outside of the Winchester, Virginia market in Charles Town, West Virginia. When Mid Atlantic advised the Commission that this station was being acquired *for the purpose* of moving it to the Winchester market, Mid Atlantic's arguments were rejected as "speculative." Now, when Clear Channel is, in fact, moving the station into the Winchester market, Clear Channel complains that it is too late for the Commission to scrutinize this move, since the "hard look" analysis applies only to "assignment or transfer of a broadcast license." If the Commission accepts Clear Channel's position, it is elevating form over substance and encouraging parties to escape a "hard look" analysis by utilizing the two step procedure used by Clear Channel to avoid that scrutiny. The Commission should not allow Clear Channel to slither out of the

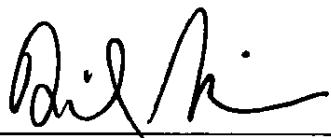
¹ By comparison, petitions for reconsideration filed under FCC Rule § 1.106 require a petitioner who was not party to the proceeding below to "show good reason why it was not possible for him to participate in the earlier stages of the proceeding." There is no such requirement in FCC Rule § 1.429.

scrutiny this transaction requires, since it is in all respects creating the exact type of consolidation the Commission has vowed to review.²

For the foregoing reasons, as well as those specified in Mid Atlantic's Petition for Reconsideration and Supplement thereto, the Commission should reconsider its grant of the captioned rule making petition.

Respectfully submitted,

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² The Commission has often shown that it is capable of "piercing the veil" of form to get to substance when the underlying motive is obvious. *See, e.g., Fox Television Stations*, 78 RR2d 1294 (1995), in which the Commission recognized that converting equity to debt to avoid alien ownership restrictions was a sham. Similarly, many of the Commission's "real party in interest" decisions made in the broadcast comparative hearing context were premised on seeing through form to get to the substance of the transaction. We would urge the Commission to do likewise here.

CERTIFICATE OF SERVICE

I, Sharon K. Mathis, a secretary with the law firm of Cole, Raywid & Braverman, L.L.P., do hereby certify that copies of the foregoing "Reply to Opposition" were sent via first class, postage prepaid, United States mail, this 5th day of April, 2004 to the following:

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